

**STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION**

**IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
DIVISION FOR THE PURPOSE OF
CONSIDERING:**

**CASE NO. 14186
ORDER NO. R- 13007-A**

**APPLICATION OF THE NEW MEXICO OIL
CONSERVATION DIVISION FOR A
COMPLIANCE ORDER AGAINST
McELVAIN OIL AND GAS PROPERTIES,
INC., SAN JUAN COUNTY,
NEW MEXICO.**

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on October 16, 2008, at Santa Fe, New Mexico, before Examiners David K. Brooks, Richard Ezeanyim and Terry Warnell.

NOW, on this 12th day of January, 2009, the Division Director, having considered the testimony, the record and the recommendations of the Examiner,

FINDS THAT:

- (1) Due notice has been given, and the Division has jurisdiction of the subject matter of this case.
- (2) The Oil Conservation Division, acting through its Compliance and Enforcement Manager, ("the Division") filed this application seeking assessment of civil penalties against respondent, McElvain Oil and Gas Properties, Inc. ("McElvain") for its alleged failure to close two drilling pits within the time required by former Division Rule 50 [19.15.2.50 NMAC (repealed)].
- (3) At the hearing, both the Division and McElvain appeared through counsel and offered testimony and documentary evidence pertinent to this application.
- (4) The following relevant matters are undisputed:

(a) McElvain is, and was at all relevant times, the operator of the Weidemer Well No. 6 (API No. 30-045-34059), located in Unit N, and the Weidemer Well No. 7 (API no. 30-045-34056), located in Unit F, both in Section 34, Township 27 North, Range 10 West, San Juan County, New Mexico.

(b) In the Weidemer Well No. 6, the production string casing was set and cemented on February 5, 2007. Final completion operations, such that the well was ready for production, were concluded on April 6, 2007.

(c) In the Weidemer Well No. 7, the production string casing was set and cemented on January 27, 2007. Final completion operations, such that the well was ready for production, were concluded on March 30, 2007.

(d) The drilling pits for these wells were closed on September 25, 2007. There is no allegation of contamination resulting from these pits, and nothing further remains to be done respecting these pits.

(e) Former Division Rule 50, which governs this proceeding, provided that a pit "shall be properly closed within six months after cessation of use."

(5) The Division presented the testimony of Division inspector, Kelly Roberts, Division environmental specialist, Brandon Powell, and Division district supervisor, Charlie Perrin, who testified as follows:

(a) The Division has consistently interpreted Rule 50 to require that pits permitted as drilling pits be closed within six months after the last casing string is set and cemented, if the well is completed for production, or after cessation of drilling if the well is a dry hole. This interpretation was established in a memorandum from the Division Director to district personnel dated November 12, 2004.

(b) Division witnesses orally informed McElvain representatives, John Steuble and Art Merrick, of the Division's interpretation of Rule 50's closure requirement on May 30, 2007, during an administrative conference relating to the pit at another McElvain well site not involved in this case. Division witnesses again orally informed Mr. Merrick of the Division's interpretation in a telephone conference, also relating to another McElvain well, not involved in this case, on August 13, 2007.

(6) McElvain presented the testimony of Mr. Steubel and Mr. Merrick, who testified as follows:

(a) McElvain interpreted Rule 50 to require closure of drilling pits within six months after a well is "completed," meaning that it is ready to start production. This interpretation is consistent with the Rule's language requiring closure within six months after cessation of use because McElvain typically uses

drilling pits in connection with fracture treatment and swabbing operations that are conducted after setting and cementing of production string casing.

(b) McElvain's witnesses attended the administrative conference on May 30, 2007, and Mr. Merrick participated in the telephone conference with OCD representatives on August 13, 2007. The issue of when the six-month period for closure of pits began to run was not involved in either of those conferences because those pits were past the required date for closure regardless of how Rule 50 is interpreted. The witnesses did not recall any discussion of OCD's interpretation that the time for closure begins to run from the date of setting and cementing of the last casing string during either of those conferences.

(c) The Division's interpretation of Rule 50 in this respect is not included in the Division's published pit rule guidelines, and McElvain was unaware of the Division's interpretation until after its closure of the pits at the Weidemer wells.

(d) McElvain closed the pits at the Weidemer Well No. 6 and the Weidemer Well No. 7 within three days after the Division specifically demanded that those pits be closed.

The Division Director concludes the following:

(7) The Division's interpretation of Rule 50's requirement for pit closure is a reasonable one, and should be confirmed. The variety of operations that could be considered part of "completion" and the length of time that could intervene between the setting of production string casing and such operations could result in drilling pits remaining open indefinitely, a result not intended by Rule 50, and not consistent with the Division's mandate to protect public health and the environment. Rule 50 allowed operators to request extension of the time provided for pit closure, which McElvain did not do for either of the Weidemer wells.

(8) Therefore, McElvain violated Rule 50 by failure to close the pits at the Weidemer wells within six months after the setting of the production string casing in those wells.

(9) However, the Division Director cannot conclude, on this record, that McElvain's violations of Rule 50 were, "knowing and willful," as required by NMSA 1978, Section 70-2-31 for assessment of civil penalties, for the following reasons:

(a) The language of Rule 50 is ambiguous, and McElvain's interpretation is not, *prima facie*, unreasonable.

(b) The Division did not provide McElvain with written notice of its interpretation of Rule 50 prior to the closure of the pits at the Weidemer wells.

(c) Failure of the McElvain witnesses to focus on the OCD representatives' oral discussion of when the time for pit closure began to run is understandable since these oral discussions related to pits that had remained open for longer than the stipulated six-month period regardless of which interpretation was followed.

(d) Although an operator's failure to know the rules does not excuse violation of the rules by act knowingly and willfully done, an operator's adherence to an interpretation that is not inherently unreasonable of ambiguous language in a published rule does preclude a finding that its action was knowing and willful unless the Division clearly establishes that the operator had actual notice of the Division's interpretation.

(10) Accordingly, the Division's application for civil penalties in this case should be denied.

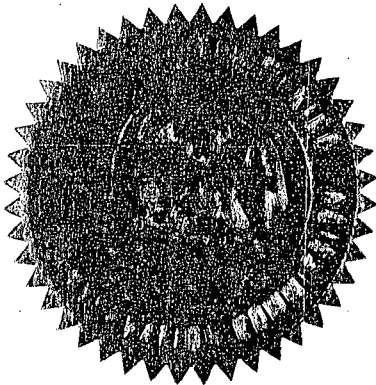
IT IS THEREFORE ORDERED THAT:

(1) McElvain Oil and Gas Properties, Inc. violated former Division Rule 50 by failing to close its drilling pits at the Weidemer Well No. 6 (API No. 30-045-34059) and the Weidemer Well No. 7 (API no. 30-045-34056) in San Juan County, New Mexico within six months after the last casing strings in those wells were set and cemented. However, the Division did not establish that these violations were knowing and willful.

(2) Accordingly, the Division's application for assessment of civil penalties against McElvain is denied.

(3) Jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.



SEAL

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

A handwritten signature in black ink, appearing to read 'Mark E. Fesmire', written over a horizontal line.

MARK E. FESMIRE, P.E.
Director